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7  
8 IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON  
9

10 NATIONAL SHOOTING SPORTS  
FOUNDATION, INC.,

11 Plaintiff,

CASE NO. 2:23-cv-00113-MKD

12 v.  
13  
14 ROBERT W. FERGUSON,  
15 ATTORNEY GENERAL OF THE  
STATE OF WASHINGTON,  
16

17 Defendant.

18  
19 [PROPOSED] BRIEF OF GUN VIOLENCE PREVENTION GROUPS  
20 AS AMICI CURIAE IN SUPPORT OF  
21 DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO  
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION  
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BRIEF OF GUN VIOLENCE PREVENTION GROUPS AS  
AMICI CURIAE  
[2:23-cv-00113-MKD]

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## TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENTS .....	VI
INTERESTS OF AMICI CURIAE.....	1
ARGUMENT .....	1
I.    BY IMPOSING LIABILITY ON BAD ACTORS IN THE GUN INDUSTRY FOR THEIR OWN IRRESPONSIBLE PRACTICES, SSB 5078 ADDRESSES THEIR PIVOTAL ROLE IN FACILITATING GUN VIOLENCE IN WASHINGTON .....	2
II.   WHAT CONSTITUTES LAWFUL AND REASONABLE CONDUCT UNDER SSB 5078 IS KNOWN AND KNOWABLE BY GUN INDUSTRY ACTORS.....	7
III.  SSB 5078 DOES NOT VIOLATE THE SECOND AMENDMENT.....	13
CONCLUSION.....	15

## **TABLE OF AUTHORITIES**

	Page(s)
2	
3	Cases
4	
5	<i>Def. Distributed v. Bonta</i> , No. 2:22-cv-6200, 2022 WL 15524977 (C.D. Cal. Oct. 21, 2022). <i>adopted by</i> 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).....13
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10	
11	<i>Kennedy v. Bremerton School District</i> , 142 S. Ct. 2407 (2022).....13
12	
13	<i>Leo Combat, LLC v. U.S. Dep’t of State</i> , No. 15-cv-2323-NYW, 2016 WL 6436653 (D. Colo. Aug. 29, 2016).....13
14	
15	
16	<i>In re Luckygunner LLC</i> , No. 14-21-00194, 2021 WL 1904703 (Tex. Ct. App. May 12, 2021).....5
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21	<i>NAACP v. AcuSport, Inc.</i> , 271 F. Supp. 2d 435 (E.D.N.Y. 2003).....5, 9
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6	Dec. 12, 2022).....	12
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8	873 F.3d 670 (9th Cir. 2017) (en banc) .....	13
9	<i>United States v. Cooper</i> , No. 2:23-mj-00174 (W.D. Wash. Apr. 17,	
10	2023) .....	4
11	<i>United States v. Tilotta</i> ,	
12	No. 3:19-cr-04768, 2022 WL 3924282 (S.D. Cal. Aug. 30, 2022).....	13
13	<b>Statutes</b>	
14	Protection of Lawful Commerce in Arms Act.....	1
15	<b>Substitute Senate Bill 5078</b>	
16	68th Leg., Reg. Sess. (Wash. 2023).....	1, 2, 3, 4
17	§ 1(1).....	3
18	§ 1(3).....	2, 7
19	§ 2(1)(f).....	3, 4
20	§ 2(1)(g).....	4
21	§ 2(4).....	7
22	§ 2(5).....	7
23	§ 2(11).....	6
24	§ 4.....	3
25	<b>Other Authorities</b>	
26	<i>Agreement Between Smith &amp; Wesson and the Departments of the</i>	
27	<i>Treasury and Housing and Urban Development, Local</i>	
28	<i>Governments and States</i> (Mar. 7, 2000), available at	
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18	
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6	The White House, <i>Fact Sheet: President Biden Announces New Actions to Reduce Gun Violence and Make Our Communities Safer</i> (Mar. 14, 2023), available at <a href="https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/14/fact-sheet-president-biden-announces-new-actions-to-reduce-gun-violence-and-make-our-communities-safer">https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/14/fact-sheet-president-biden-announces-new-actions-to-reduce-gun-violence-and-make-our-communities-safer</a> .....	5
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1                   **CORPORATE DISCLOSURE STATEMENTS**

2                   Brady Center to Prevent Gun Violence (“Brady”) is a nonprofit organization.  
3 It has no parent corporations. It has no stock, and therefore no publicly held company  
4 owns 10% or more of its stock.

5                   Everytown for Gun Safety Support Fund (“Everytown”) is a nonprofit  
6 organization. It has no parent corporations. It has no stock, and therefore no publicly  
7 held company owns 10% or more of its stock.

8                   Giffords Law Center to Prevent Gun Violence (“Giffords”) is a nonprofit  
9 organization. It has no parent corporations. It has no stock, and therefore no publicly  
10 held company owns 10% or more of its stock.

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## INTERESTS OF AMICI CURIAE

Amici Everytown, Brady, and Giffords are national gun violence prevention organizations that have decades of experience researching the causes of and contributors to gun violence, including the role the gun industry can play in reducing such violence and diversion of firearms into the criminal market. Amici are well-positioned to assist the Court in understanding how irresponsible gun industry conduct may give rise to a public nuisance, and the varied tools available to the gun industry to reduce the magnitude of the problem. Amici also have extensive experience litigating cases involving the gun industry, including cases involving the Protection of Lawful Commerce in Arms Act and the Second Amendment.

## ARGUMENT

Plaintiff National Shooting Sports Foundation (“NSSF”) has asserted a facial challenge to Substitute Senate Bill 5078, 68th Leg., Reg. Sess. (Wash. 2023) (“SSB 5078” or “the Statute”). SSB 5078 subjects gun industry actors to civil liability when their irresponsible, dangerous, and unlawful actions create a public nuisance as defined by the Statute. As Defendant’s briefs demonstrate, NSSF’s challenge is meritless and should be rejected.

Amici write to address three of NSSF’s arguments, about which Amici have particular expertise. *First*, SSB 5078 is not designed “to make manufacturers and sellers of firearms pay for harms caused by criminals,” as NSSF contends. NSSF Br. at 1 (ECF No. 17). Instead, the statute imposes liability on reckless gun industry actors for *their own dangerous actions*. That is logical, because irresponsible and unlawful conduct by gun industry actors directly facilitates gun violence. *Second*, NSSF is wrong that SSB 5078’s reasonableness standard makes it impossible for gun industry actors to determine what type of conduct runs afoul of SSB 5078. *Id.* at 21-22, 25-26. There is a wealth of available information regarding reasonable

1 practices and controls that gun industry actors can take to prevent and reduce the  
 2 diversion of firearms to the criminal market and thereby mitigate the public health  
 3 crisis of gun violence. *Third*, SSB 5078 does not violate the Second Amendment  
 4 because that constitutional provision does not apply to or prohibit this type of  
 5 reasonable regulation of firearms-related commerce.

6 **I. By Imposing Liability on Bad Actors in the Gun Industry for Their Own  
 7 Irresponsible Practices, SSB 5078 Addresses Their Pivotal Role in  
 Facilitating Gun Violence in Washington.**

8 SSB 5078 holds irresponsible gun industry actors accountable for  
 9 unreasonable actions *they take* in connection with supplying guns to the criminal  
 10 gun market and facilitating illegal use of guns. As the Washington legislature  
 11 recognized, many firearm industry members “take reasonable precautions to protect  
 12 others’ lives and well-being.” SSB 5078 § 1(3). SSB 5078 is directed at the other  
 13 contingent—those that have “implemented irresponsible and dangerous sales,  
 14 distribution, importing and marketing practices, including contributing to the  
 15 development of an illegal secondary market” for firearms and related products. *Id.*

16 The connection between unreasonable behavior by some gun industry actors  
 17 and the proliferation of gun violence, which SSB 5078 addresses, is well established.  
 18 Webster Decl. ¶¶ 13-16, 18-24 (ECF No. 39); Gundlach Decl. ¶¶ 11, 15-18 (ECF  
 19 No. 36).<sup>1</sup> Guns frequently end up in the hands of criminals as a result of gun  
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21 <sup>1</sup> See Daniel Semenza & Richard Stansfield, *Curbing the Illicit Market: Enhancing*  
 22 *Firearm Regulations to Reduce Gun Violence*, ROCKEFELLER INSTIT. OF GOV’T, at 1-  
 23 3 (May 2023), available at <https://rockinst.org/issue-area/curbing-the-illicit-market->  
 24 enhancing-firearm-regulations-to-reduce-gun-violence (citing ATF, *How Guns*  
 25  
 26

1 companies' and dealers' distribution and sale of guns to straw purchasers  
 2 (purchasers buying guns for someone else), prohibited purchasers (individuals  
 3 precluded by law from having guns), and gun traffickers, and as a result of thefts  
 4 from those entities. Webster Decl. ¶¶ 9-12; Gundlach Decl. ¶¶ 10-12. Indeed, nearly  
 5 all guns used in a crime or suspected of having been used in a crime ("crime guns")  
 6 are sourced originally from the legal market. Gundlach Decl. ¶ 13; Webster Decl.  
 7 ¶ 10.

8 SSB 5078 tackles the problem of "irresponsible, dangerous, and unlawful  
 9 business practices" that "contribute[] to the illegal use of firearms" by imposing  
 10 liability on gun industry actors that fail to adopt three types of practices: (i) practices  
 11 to prevent unlawful sales; (ii) practices to prevent firearm loss or theft; and (iii)  
 12 practices to ensure compliance with existing laws. SSB 5078 §§ 1(1), 2(1)(f). Each  
 13 type of business practice relates to actions gun industry actors themselves can (and  
 14 sometimes do) take to reduce illicit gun possession and use.

15 Taking one example, SSB 5078 imposes liability on a gun industry actor (e.g.,  
 16 a retail gun store) that fails to use reasonable procedures to prevent the sale of a  
 17 firearm to a straw purchaser, which is defined as a person who wrongfully purchases

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 19 *Flow from Legal to Illegal Commerce* (last accessed June 7, 2023), available at  
 20 <https://www.atf.gov/resource-center/infographics/how-guns-flow-legal-illegal-commerce>); see also Glenn Thrush & Katie Benner, *6 Gun Shops, 11,000 'Crime  
 21 Guns': A Rare Peek at the Pipeline*, NY TIMES (Apr. 28,  
 22 2022), <https://www.nytimes.com/2022/04/28/us/politics/gun-shops-weapons-resell.html>.

1 or obtains the product on behalf of a third party. *Id.* §§ 2(f)-(g), 4. Straw purchases  
 2 are a common pathway for diversion of guns into the illicit market. Webster Decl.  
 3 ¶ 11. Research has long shown that a substantial number of federally licensed gun  
 4 dealers facilitate firearms diversion through straw purchasing. Gundlach Decl. ¶ 10-  
 5 17.<sup>2</sup> By attaching civil liability for gun industry actors' failure to use reasonable  
 6 business practices to prevent straw purchases, SSB 5078 incentivizes responsible  
 7 and lawful behavior by those actors, separate and apart from the criminal legal  
 8 consequences frequently imposed on straw purchasers themselves.

9 Notably, irresponsible and dangerous gun industry conduct regarding straw  
 10 purchasers plagues Washington State. For instance, the United States Department of  
 11 Justice ("DOJ") recently filed charges against an alleged straw purchaser who  
 12 bought more than 100 firearms from at least nine federally licensed dealers in the  
 13 greater Seattle area between June 2021 and March 2023, including one gun that was  
 14 used in an armed robbery and assault. Complaint at 6, 8, *United States v. Cooper*,  
 15 No. 2:23-mj-00174 (W.D. Wash. Apr. 17, 2023) (Dkt. 1). Employees from two of  
 16 the dealers confirmed that the purchaser displayed suspicious behavior commonly

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17 <sup>2</sup> See also Anthony A. Braga et al., *Underground Gun Markets and the Flow of*  
 18 *Illegal Guns into the Bronx and Brooklyn: A Mixed Methods Analysis*, 98 J. URBAN  
 19 HEALTH 596, 598 (2020), available at  
 20 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8566688/>; Garen J. Wintemute et  
 21 al., *Risk factors among handgun retailers for frequent and disproportionate sales of*  
 22 *guns used in violent and firearm related crimes*, 11 INJ. PREVENTION 357, 357  
 23 (2005), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1730299>.

1 associated with straw purchasing and that they assumed that the individual was  
 2 “likely selling [guns] to other people”—and yet, both retailers sold firearms to him  
 3 anyway. *Id.* at 7-8. Had SSB 5078 been in effect prior to these sales, retailers such  
 4 as these would have been strongly incentivized to adopt reasonable controls against  
 5 straw purchasing to prevent such illegal sales, and the state would have been able to  
 6 institute a civil action to hold these retailers accountable for their conduct.

7 SSB 5078 also targets irresponsible and dangerous gun industry conduct  
 8 involving online sales practices. In a case litigated in Texas, an online ammunition  
 9 seller allegedly failed to require any proof that its customers were of legal age,  
 10 resulting in the unlawful sale of handgun ammunition to a 17-year-old who used it  
 11 to murder ten of his classmates and teachers. *See In re Luckygunner LLC*, No. 14-  
 12 21-00194, 2021 WL 1904703 (Tex. Ct. App. May 12, 2021). Online sellers such as  
 13 these target customers nationwide. Such unreasonable business practices and failures  
 14 to implement obvious, simple, and low-cost precautions, if directed at residents of  
 15 Washington, may now be actionable under SSB 5078.

16 SSB 5078 also addresses the well-recognized problem of irresponsible and  
 17 dangerous marketing by gun industry actors. SSB 5078 § 2(11). Such marketing—  
 18 and its role in encouraging gun violence—is a recognized problem.<sup>3</sup> NSSF itself  
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20 <sup>3</sup> *See, e.g., NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 510 (E.D.N.Y. 2003)  
 21 (noting that “proposals for changes in the marketing and distribution of firearms  
 22 would reduce the illegal market in firearms and the injuries to the NAACP, its  
 23 members, and potential members”); Letter from U.S. Senator Richard A. Blumenthal  
 24 et al. to the Fed. Trade Comm’n Chair Linda Khan (Sept. 12, 2022), *available at*  
 25

suggests that depictions of firearms and violence in other media (*e.g.*, action films and video games) “may actually encourage gun violence,” NSSF Br. at 23, without explaining how the use of similar tactics by industry companies is any different.<sup>4</sup>

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<https://www.blumenthal.senate.gov/imo/media/doc/9122022ftcunfairmarketingbyfirearmsindustryletter.pdf>; The White House, *Fact Sheet: President Biden Announces New Actions to Reduce Gun Violence and Make Our Communities Safer* (Mar. 14, 2023), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/14/fact-sheet-president-biden-announces-new-actions-to-reduce-gun-violence-and-make-our-communities-safer> (discussing executive order directing the Federal Trade Commission to analyze how gun manufacturers market firearms to minors and civilians).

<sup>4</sup> Gun industry marketing often references popular video games like Call of Duty and Grand Theft Auto, and suggests violent or militaristic uses of guns even when marketing to civilians. For example, firearm manufacturer Daniel Defense’s social media include images from the perspective of a sniper with the caption “Rooftop ready, even at midnight” to invoke an offensive military combat fantasy that is illegal and inappropriate for civilians. @DanielDefense, INSTAGRAM (Mar. 2, 2022) (last accessed Mar. 24, 2023). This type of firearms marketing appeals to individuals with violent fantasies, like mass shooters. *See, e.g.*, *Everytown Files Complaint with FTC*

1 Given data showing that adolescent and young adult men are highly susceptible to  
 2 advertisements depicting impulsive, thrill-seeking behavior, it makes perfect sense  
 3 to require gun industry actors to market their products in a responsible and  
 4 reasonable manner, especially where minors are concerned. See Cornelia Pechmann  
 5 et al., *Impulsive and Self-Conscious: Adolescents' Vulnerability to Advertising and*  
 6 *Promotion*, J. Pub. Policy & Marketing, 202, 203-07 (2005), available at  
 7 <https://journals.sagepub.com/doi/10.1509/jppm.2005.24.2.202>. It is also fair and  
 8 consistent with historical precedent to hold gun industry actors accountable for  
 9 unreasonable marketing. Gundlach Decl. ¶¶ 94-103; Busse Decl. ¶¶ 21, 43-50, 53  
 10 (ECF No. 33).

11 \* \* \*

12 It is simply untrue, despite NSSF's claims, that SSB 5078 imposes liability on  
 13 rule-following gun industry actors for "the behavior of third-party criminals outside  
 14 [of the gun industry actor's] control." Reh Decl. ¶ 16 (ECF No. 19). To the contrary,  
 15 the statute is directed at unreasonable, irresponsible, and unlawful conduct  
 16 committed by gun industry actors themselves. Such conduct unquestionably "lead[s]  
 17 to public harms," which SSB 5078 is designed to reduce. SSB 5078 § 1(3).

18 **II. What Constitutes Lawful and Reasonable Conduct Under SSB 5078 Is  
 19 Known and Knowable by Gun Industry Actors.**

20 NSSF's claim that gun industry participants cannot figure out how to comply  
 21 with SSB 5078 is similarly unfounded. NSSF and responsible actors within the gun

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22 *Urging Investigation of Daniel Defense, LLC*, EVERYTOWN LAW (July 24, 2022),  
 23 available at <https://everytownlaw.org/case/everytown-files-complaint-with-ftc-urging-investigation-of-daniel-defense-llc>.

1 industry are well aware of known reasonable measures they can take to reduce the  
 2 risk of firearms diversion and illegal use; as discussed below, some have already  
 3 implemented them. Far from imposing an incomprehensible standard, SSB 5078  
 4 aligns with decades of evidence and experience that illuminate the contours of  
 5 responsible gun industry participation.

6       Contrary to NSSF's claim, SSB 5078 does *not* require gun industry members  
 7 to "adopt *any and all* procedures." NSSF Br. at 26 (emphasis added). It requires the  
 8 use of *reasonable* controls and precautions. SSB 5078 § 2(4)-(5). "Reasonable  
 9 controls" is defined to mean "reasonable procedures, safeguards, and business  
 10 practices" designed to prevent prohibited sales, minimize loss or theft of firearms,  
 11 and promote compliance with existing State and federal law. *Id.* § 2(1)(f).

12       NSSF complains that gun industry members have no way of knowing what  
 13 "controls" will be deemed reasonable under this framework. *See* NSSF Br. at 25-26.  
 14 But NSSF's own actions, governmental agency guidance, industry participant  
 15 findings, and suggested manufacturer and distributor protocols, taken together,  
 16 reveal that NSSF is simply conjuring up imaginary confusion for litigation purposes.

17       First, NSSF's efforts over the last two decades show that its befuddlement is  
 18 feigned. NSSF has boasted about its efforts to promote responsible gun industry  
 19 behavior in numerous areas, including the three identified in SSB 5078 (*i.e.*, business  
 20 practices designed to prevent unlawful sales, firearm loss and theft, and compliance  
 21 with applicable laws). Gundlach Decl. ¶¶ 47-52. NSSF even disseminates a training  
 22 video to its members called "Don't Lie for the Other Guy," which "assist[s] firearms  
 23 retailers in detecting and preventing straw purchases" by identifying a series of  
 24 questions to flag suspicious purchasers. *Id.* ¶ 48. And NSSF promotes a joint  
 25 initiative with the federal government called "Operation Secure Store" to help gun  
 26 stores "make well-informed security related decisions to deter and prevent thefts."

1 *Id.* ¶¶ 51-52. NSSF also recently promoted several “firearm industry safety  
 2 initiatives,” including efforts to “address robbery and burglary of firearms” via  
 3 “conduct[ing] retail store security seminars, assist[ing] Federal Firearms License]  
 4 retailers with store security audits of their premises and endors[ing] and promot[ing]  
 5 the use of security products like smash resistant display cases.” NSSF, *NSSF*  
 6 *Welcomes Bipartisan U.S. House FFL Protection Act Bill* (Apr. 26, 2023), available  
 7 at <https://www.nssf.org/articles/nssf-welcomes-bipartisan-u-s-house-ffl-protection-act-bill>. Such initiatives represent just a few examples of the “reasonable controls”  
 8 available to industry members—with which NSFF is unquestionably familiar.  
 9

10       Beyond NSSF’s own communications to its members regarding reasonable  
 11 controls, DOJ also has identified reasonable behavior that is expected from gun  
 12 industry actors. In 2001, DOJ disseminated specific, reasonable safeguards that  
 13 industry actors should pursue to prevent the diversion of firearms, including  
 14 “identify[ing] and refus[ing] to supply dealers and distributors that have a pattern of  
 15 selling guns to criminals and straw purchasers” and developing a “training program  
 16 for dealers and distributors covering compliance with firearms laws, identifying  
 17 straw purchase scenarios and securing inventory.” DOJ, *Gun Violence Reduction:*  
 18 *National Integrated Firearms Violence Reduction Strategy*, 29-30 (Jan. 18, 2001)  
 19 <https://www.justice.gov/archive/opd/Strategy.htm#Industry%20Self-Policing>; see  
 20 also *NAACP*, 271 F. Supp. 2d at 523 (evidence introduced at trial established that  
 21 firearms manufacturers and distributors “could—voluntarily and through easily  
 22 implemented changes in marketing and more discriminating control of the sales  
 23 practices of those to whom they sell their guns—substantially reduce the harm

1 occasioned by the diversion of guns to the illegal market and by the criminal  
 2 possession and use of those guns”).<sup>5</sup>

3 Next, researchers and industry participants themselves have, through decades  
 4 of study and experience, identified a range of clear, manageable procedures that  
 5 reduce the risk of firearms diversion. For instance, the owner of a licensed dealer in  
 6 Minnesota recently spoke about his store’s capacity to reduce and prevent straw  
 7 purchases, including by recognizing red flags of straw purchases such as (i) buyer  
 8 nervousness; (ii) a buyer’s lack of knowledge about her guns of choice or use of  
 9 reference photographs to identify them; and (iii) a buyer texting during a

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 15       <sup>5</sup> The court found, for example, that diversion into the illegal market would be  
 16 “substantially decreased” if “manufacturers and distributors insisted that retail  
 17 dealers who sell their guns be responsible—e.g., that they not sell at gun shows, but  
 18 sell from the equivalent of a store front with a supply of stocked guns; that they not  
 19 sell under a variety of names; that they protect against theft; that they train and  
 20 supervise employees to prevent straw sales (which are often notoriously obvious to  
 21 the seller); and that they take other appropriate and available protective action.” 271  
 22 F. Supp. 2d at 450. The court ultimately dismissed the case on other grounds,  
 23 concluding that the plaintiff lacked standing. *Id.* at 499.  
 24  
 25  
 26

1 transaction.<sup>6</sup> And, Walmart, one of the largest gun dealers in the country, has  
 2 published guidelines for responsible firearms sales, which include practices like  
 3 videotaping the point of sale, performing inventory audits, and conducting regular  
 4 training for firearms sales associates.<sup>7</sup>

5 Finally, known processes available to manufacturers and distributors—not  
 6 just dealers—can reduce diversion. These practices include: (i) monitoring  
 7 downstream actors for risky sales patterns; (ii) refusing to supply bad actor dealers  
 8 that have a record of frequently and disproportionately selling crime guns; (iii)  
 9 requiring downstream dealers to conduct anti-straw-purchasing trainings; and (iv)  
 10 monitoring downstream dealers through visitation and other regular contact. Many  
 11 of these known practices are easy to implement by leveraging existing contracts and  
 12 communication processes among manufacturers, distributors, and dealers. Gundlach  
 13 Decl. ¶¶ 53-60.

14 Looking to established practices, manufacturers and distributors may, for  
 15 example, monitor downstream actors for risky sales patterns based on the “trace”  
 16 requests that they receive from the federal government. *Id.* ¶ 59 (noting that Beretta  
 17 has used this approach). When a law enforcement agency recovers a gun in  
 18 connection with crime, the agency can request that the federal government “trace”  
 19

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20 <sup>6</sup> Jeff Wagner, *How is a gun retailer supposed to stop straw purchases?*, CBS MINN.  
 21 (Oct. 17, 2022), <https://www.cbsnews.com/minnesota/news/how-is-a-gun-retailer->  
 22 supposed-to-stop-straw-purchases.

23  
 24 <sup>7</sup> *Walmart Policies and Guidelines: Firearms and Ammunition Guidelines*,  
 25 WALMART, <https://corporate.walmart.com/policies> (last accessed June 6, 2023).

1 the firearm's path through the chain of distribution, from manufacturer through the  
 2 first retail sale. ATF, *Fact Sheet – National Tracing Center* (Apr. 2023),  
 3 <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-national-tracing-center>.  
 4 By monitoring these requests, gun manufacturers can identify disproportionate  
 5 diversion patterns, require downstream distributor and retailer reporting of trace  
 6 requests, and take appropriate corrective action.

7 These established practices are examples of industry participants' reasonable  
 8 exercise of common sense. Bolstering this position, Smith & Wesson—one of the  
 9 nation's largest gun manufacturers—once agreed to implement a detailed protocol  
 10 that included these and other distribution controls described above. *Agreement*  
 11 *Between Smith & Wesson and the Departments of the Treasury and Housing and*  
 12 *Urban Development, Local Governments and States*, at Part II (Mar. 7, 2000),  
 13 available at <https://www.nraila.org/articles/20000317/smith-wesson-settlement-agreement>. Among other procedures, Smith & Wesson agreed to require that sellers  
 15 of their products: (i) track dealers that sold disproportionate numbers of guns  
 16 ultimately recovered by law enforcement; (ii) limit multiple handgun purchases by  
 17 the same individual within a short period; (iii) maintain an electronic firearms  
 18 inventory; (iv) conduct monthly inventory audits; and (v) implement anti-theft  
 19 security plans. *Id.* Though not ultimately enforced, the settlement shows the capacity  
 20 of industry members to identify and adopt reasonable practices to reduce firearms  
 21 diversion and other risk factors for gun violence.

22 NSSF's claims that its members are confounded by how to comply with SSB  
 23 5078's marketing requirements fare no better. Reasonable marketing practices—  
 24 including age-gating to prevent minors from viewing product ads for items they  
 25 cannot lawfully purchase, incorporating risk and safety disclosures, and limiting the  
 26 use of marketing that appeals to juveniles or criminals—have been adopted in

1 analogous contexts, such as the sale of tobacco, e-cigarettes, gambling, and alcohol.  
 2 And, in any event, the groundwork for reasonable limitations in firearms marketing  
 3 has already been laid. For example, in the 2001 Smith & Wesson settlement  
 4 agreement discussed above, the company agreed to restrictions on marketing guns  
 5 in ways that would make them “particularly appealing to juveniles or criminals, such  
 6 as advertising a firearm as ‘fingerprint resistant.’” The manufacturer also reaffirmed  
 7 its commitment to avoiding advertisements near schools. *Id.* at Part II.D.

8 Contrary to NSSF’s claims, the gun industry knows responsible marketing  
 9 practices. Many gun industry actors, however, simply choose not to implement them.  
 10 SSB 5078 is designed to change the calculus for those irresponsible actors.

11 In short, and contrary to NSSF’s assertions in this lawsuit, industry members  
 12 are well-positioned to identify and implement reasonable conduct to avoid  
 13 endangering the public.

### 14 **III. SSB 5078 Does Not Violate the Second Amendment.**

15 NSSF has not plausibly alleged a Second Amendment claim, let alone  
 16 established a likelihood of success on the merits. Under the text-and-history  
 17 framework established by *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct.  
 18 2111 (2022), the burden to show that “the Second Amendment’s plain text covers  
 19 an individual’s conduct,” *id.* at 2117, is on the plaintiff challenging a law. Only *after*  
 20 the textual inquiry is satisfied does a presumption of constitutional protection arise.  
 21 See *id.* at 2126, 2141 n.11; *Or. Firearms Fed’n v. Brown*, No. 2:22-cv-01815, 2022  
 22 WL 17454829, at \*9-12 (D. Or. Dec. 6, 2022) (reading *Bruen* to place the burden on  
 23 the plaintiff at the initial, textual step of the inquiry), *appeal dismissed*, No. 22-  
 24 36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022); *Nat’l Ass’n for Gun Rights v.*  
 25 *City of San Jose*, 618 F. Supp. 3d 901, 914 (N.D. Cal. 2022) (same). Placing the  
 26 initial burden on the plaintiff accords with the Court’s approach to other

1 constitutional rights. *See, e.g., Kennedy v. Bremerton School District*, 142 S. Ct.  
 2 2407, 2421 (2022) (discussing a plaintiff's burden in First Amendment cases).

3 NSSF has not come close to meeting its textual burden here. The Second  
 4 Amendment guarantees the right of “the people” to “keep and bear” arms, not the  
 5 right of the firearms industry to manufacture or sell arms. *Teixeira v. Cnty. of*  
 6 *Alameda*, 873 F.3d 670, 673 (9th Cir. 2017) (en banc). Accordingly, NSSF’s attempt  
 7 to assert a constitutional right to sell firearms necessarily fails. *See also United States*  
 8 *v. Tilotta*, No. 3:19-cr-04768, 2022 WL 3924282, at \*5 (S.D. Cal. Aug. 30, 2022)  
 9 (explaining that, “textually, the ordinary meaning of ‘keep and bear’ does not include  
 10 ‘sell or transfer’”). And the same logic applies to any asserted right to manufacture  
 11 firearms. *See Teixeira*, 873 F.3d at 690 n.24; *see also Def. Distributed v. Bonta*, No.  
 12 2:22-cv-6200, 2022 WL 15524977, at \*4 (C.D. Cal. Oct. 21, 2022) (Second  
 13 Amendment’s plain text “quite-clearly” does not include any “implicit[]” right to  
 14 “manufacture firearms”), *adopted by* 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

15 Moreover, NSSF does not explain how it or the firearms industry members it  
 16 has identified—all of which are corporate entities—are part of “the people”  
 17 protected by the Second Amendment. They are not, as multiple courts have held.  
 18 *See, e.g., Gazzola v. Hochul*, No. 1:22-cv-01134, 2022 WL 17485810, at \*14  
 19 (N.D.N.Y. Dec. 7, 2022), *appeal docketed*, No. 22-3068 (2d Cir. Dec. 5, 2022); *Leo*  
 20 *Combat, LLC v. U.S. Dep’t of State*, No. 15-cv-2323-NYW, 2016 WL 6436653, at  
 21 \*8-10 (D. Colo. Aug. 29, 2016).

22 Nor are NSSF’s claims *connected* to any right of “the people” to keep and  
 23 bear arms. *Cf. Teixeira*, 873 F.3d at 687. NSSF suggests, without elaboration, that  
 24 Washington’s law implicates the right to “acquire arms.” Compl. at 32 ¶ 92; PI Mot.  
 25 at 34. But, as Defendant explains, NSSF fails to allege or offer any evidence of that.  
 26

1 NSSF, therefore, cannot state a Second Amendment claim, let alone show a  
2 likelihood of success on the merits as required for a preliminary injunction.

Concluding that NSSF has not met its textual burden is consistent with the Supreme Court’s many assurances that “laws imposing conditions and qualifications on the commercial sale of arms” are “presumptively lawful regulatory measures.” *District of Columbia v. Heller*, 554 U.S. 570, 626-627 & n.26 (2008); see *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring). Washington’s law is one such presumptively lawful measure.

## CONCLUSION

10 The Court should grant Defendant's motion to dismiss and deny Plaintiff's  
11 motion for a preliminary injunction.

13 || DATED this 7<sup>th</sup> day of June 2023.

Respectfully Submitted,

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